Nos. 17-1717, 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE UTAH HIGHWAY PATROL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amicus Curiae* 1

Summary of Argument 4

I. Our Nation Has A Long, Rich History and Tradition—Continuing To The Present Day—Of Using Crosses To Memorialize The Fallen 6

II. Crosses That Memorialize The Fallen Are Not Constitutionally Suspect 20

Conclusion 25

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Atheists, Inc. v. *Davenport*,
637 F.3d 1095 (10th Cir. 2010) 3, 11, 18

Am. Atheists, Inc. v. *Port Auth. of N.Y. & N.J.*,
760 F.3d 227 (2d Cir. 2014) 7, 8

Capitol Square Review & Advisory Bd. v. *Pinette*,
515 U.S. 753 (1995) 6

Cty. of Allegheny v. *ACLU*,
492 U.S. 573 (1989) 20, 21, 23

Kondrat'yev v. *City of Pensacola*,
903 F.3d 1169 (11th Cir. 2018) 6

Rosenberger v. *Rector & Visitors of Univ. of Va.*,
515 U.S. 819 (1995) 20

Salazar v. *Buono*,
559 U.S. 700 (2010) ..... *passim*

Town of Greece v. *Galloway*,
572 U.S. 565 (2014) 21, 22

Utah Highway Patrol Ass'n v. *Am. Atheists, Inc.*,
565 U.S. 994 (2011) 3

Van Orden v. *Perry*,
545 U.S. 677 (2005) 22, 23

Other Authorities

Andrew Gulliford, *In the Line of Fire*, The J. (July 21, 2012), http://goo.gl/D64yYz 15

Bayan Wang, *Prescott, Still Healing, Honors 19 Fallen Granite Mountain Hotshots Five Years Later*, Ariz. Republic (June 30, 2018) 16

Camila Martinez-Granata, *The Maltese vs. Florian Cross: Which One Is Correct?* (Mar. 10, 2017), http://goo.gl/Mu5sgA 12

Charles O. Collins & Charles D. Rhine, *Roadside Memorials*, 47 Omega 221 (2003) 23

Fallen Fire Fighters Memorial, S.D. Firefighters Ass'n, http://goo.gl/c3CLEh 13

First Aid, Organisation Internationale de Normalisation (May 1, 2011), http://goo.gl/EfGujW 17

Greek-American Greg Zanis Installs 58 Crosses to Honor Las Vegas Victims, Nat'l Herald (Oct. 7, 2017) 9

Jared Page, *State Agencies Ask Utah Highway Patrol Association to Remove Crosses*, Deseret News (Dec. 13, 2011) 2

Jay Jones, *Tourists Coming to Las Vegas Add Stops at Memorials to Victims of Deadly Shooting to Their Itineraries*, L.A. Times (Oct. 9, 2017), http://goo.gl/pW869Z 8

Kimberly Scott, *Dats Trucking Sets 15th Memorial Cross for UHP Trooper on Property Where Atheism Ban Doesn't Apply*, St. George News (Dec. 30, 2016), http://goo.gl/fZojmx 3, 19

Michael L. Kuk, *Symbols of Service*, *in International Association of Fire Chiefs: Commemorative History* (Ann Swing Kelly & Mary Burke Marshall eds., 2000) 12

Mike Shoro, *Carpenter Follows Las Vegas Crosses with Stars of David in Pittsburgh*, Las Vegas Rev. J. (Oct. 29, 2018) 8

Missoula Smokejumpers Place Granite Columns Where Firefighters Fell, Great Falls Trib. (May 21, 1997), http://goo.gl/HNr9UZ 14

National Fallen Firefighters Memorial, Nat'l Fallen Firefighters Found., http://goo.gl/j7Wa3s 13

National Fallen Firefighters Memorial Park, Tourism Council of Frederick Cty., http://goo.gl/QXG2xz; 13

New York City Police Department Combat Cross, NYC.gov, http://goo.gl/46eoHi 18

Police & Citizen Awards, Ill. Ass'n of Chiefs of Police, http://goo.gl/muQdHV 18

Rich Calder, *Steel "Cross" Will Stay at WTC Memorial: Court*, N.Y. Post (July 28, 2014) 8

Sarah Mervosh, *Mendocino Complex Fire in California Is Now Largest in Modern State History*, Inlander (Aug. 7, 2018), http://goo.gl/FrbGPe 10

SDPD Formal Awards, San Diego Police Museum, http://goo.gl/NMmf92 18

Shawn Clubb, *Sobering Signs: Roadside Memorials Plan Seeks to Increase Awareness of Drunken Driving*, St. Louis Post-Dispatch (May 20, 2008) 10

Spring Lake Memorial, Wikimedia Commons (Aug. 22, 2010), http://goo.gl/W7Aay3 17

Tana Weingartner, *Mayor Apologizes As Officers Mark Police Memorial Day*, WVXU (May 19, 2017), http://goo.gl/P4BQm3 20

Tom Kiurski, *A Piece of Fire Service History: The Maltese Cross*, Fire Eng'g (Feb. 9, 2007), http://goo.gl/UF8BJP 11, 12

Tom Kotynski, *A Mann Gulch Remembrance Tour*, Out There With Tom (June 14, 2012), http://goo.gl/tMAhb8 14

Welcome, Saint Lazare Int'l (2018), http://www.saint-lazare.org/ 17

Welcome, Wisc. St. Firefighters Memorial, http://goo.gl/wp3vjF 13

INTEREST OF *AMICUS CURIAE*[*]

The Utah Highway Patrol Association is a private, non-profit organization that supports Utah Highway Patrol troopers and their families. In 1998, the Association began commemorating officers who were killed in the line of duty by placing memorials at or near where the officers died. The memorials are 12-foot crosses with the fallen trooper's name, rank, and badge number printed across the full length of the horizontal beam of each memorial. The vertical beam bears the Utah Highway Patrol logo, the year of the officer's death, and a plaque with the trooper's photograph, biographical information, and an account of his death.

The Association chose a cross to honor the fallen troopers because crosses are used generally to commemorate the dead—and specifically by the uniformed services to memorialize those who died in the line of duty. The cross conveys the messages of death, honor, remembrance, gratitude, and sacrifice.

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[*] The parties have filed blanket consents to the filing of this brief and their letters of consent are on file with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[1]

The memorials were privately funded, owned, and maintained by the Association, with assistance from local businesses and Boy Scout troops. To ensure the memorials would be visible to the public, safe to view, and near where the officers died, the Association requested and received permission from the State of Utah to place some of the memorials on public roadside rights-of-way, at rest areas, and on the lawn of the Highway Patrol office. In approving the placements, the State made clear that it neither approved nor disapproved of the memorials.

In 2010, the Tenth Circuit ruled that the memorials located on State land violated the Establishment Clause—the first time any court in the Nation held unconstitutional a roadside cross memorializing the fallen. After the Tenth Circuit denied rehearing (over the dissent of then-Judge Gorsuch) and this Court denied review (over the dissent of Justice Thomas), the

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[1] Jared Page, *State Agencies Ask Utah Highway Patrol Association to Remove Crosses*, Deseret News (Dec. 13, 2011), http://goo.gl/wbC1QR.

Association was forced to remove the memorials and relocate them onto private land—far away from where the fallen troopers had made the ultimate sacrifice. See *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1107–11 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc); *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 565 U.S. 994, 994–1009 (2011) (Thomas, J., dissenting from denial of certiorari).

The Association has a keen interest in this case—and in the proper interpretation of the Establishment Clause more broadly—because it continues to participate in the centuries-old tradition of using crosses to memorialize those who have made the ultimate sacrifice in the line of duty. In late 2016, the Association placed its fifteenth cross to honor the memory of trooper 32-year-old Eric Ellsworth, who was struck by a car and killed while trying to alert motorists to a low-hanging power line.[2]

The Association desires to participate fully in the long and storied tradition of using crosses as symbols of remembrance—memorializing those who are no longer with us and commemorating the service and sacrifice of those who lost their lives in the line of duty. See, *e.g.*, *Salazar* v. *Buono*, 559 U.S. 700, 721 (2010) (plurality opinion) (explaining that a memorial cross built to honor World War I veterans evokes "thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles

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[2] Kimberly Scott, *Dats Trucking Sets 15th Memorial Cross for UHP Trooper on Property Where Atheism Ban Doesn't Apply*, St. George News (Dec. 30, 2016), http://goo.gl/fZojmx.

whose tragedies are compounded if the fallen are forgotten"). The Court should reverse the judgment below and confirm that crosses erected in the light of this centuries-old tradition pose no risk of establishing religion and are thus fully consistent with the Establishment Clause.

SUMMARY OF ARGUMENT

Crosses have long been used to memorialize the fallen. The practice dates back to the Founding and continues to this day—not only for veterans but also for fallen troopers and casualties of drunk driving; for wildfire fighters and first responders on 9/11; for mass-shooting victims and others killed tragically before their time.

Memorial crosses mark ground hallowed by untimely death. They embody service and sacrifice. And they honor those who have lost their lives in myriad tragic and heartbreaking ways.

Given the long history, tradition, and custom of using crosses to mark tragedy and sacrifice, they pose no constitutional problem. If anything, it would be an establishment of *irreligion* to exclude their use.

Amicus respectfully submits this brief to underscore that memorials erected relatively recently and in a variety of contexts are just as much a part of that long and storied tradition of remembrance—and just as constitutionally permissible—as those placed decades ago to honor our veterans. The tradition's persistence to the present day—now embracing other forms of service, sacrifice, and loss—is as much a sign of its importance to our Nation and its people as the length of its historical pedigree.

It is the inexorable passage of time—which carries away the memories of bravery and courage these memorials seek to preserve—that is the real enemy here. Not phantom Establishment Clause fears. So many names and stories of the fallen have already been lost to history. Their memorials—which seek to salvage some measure of permanence from the ravages of time—need not be sacrificed on the altar of a misguided notion of establishment.

ARGUMENT

I. Our Nation Has A Long, Rich History and Tradition—Continuing To The Present Day—Of Using Crosses To Memorialize The Fallen.

Our Nation has a rich history and tradition of using crosses to memorialize those who give their lives in service and sacrifice. There is no question that the cross carries with it religious meaning—but a memorial cross "evokes far more than religion." *Buono*, 559 U.S. at 721 (plurality); see also *id.* at 715 ("Although certainly a Christian symbol, * * * [p]lacement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen.").

In particular, crosses are used to honor those who make the ultimate sacrifice in the line of public duty. See *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1182 (11th Cir. 2018) (Newsom, J., concurring) ("We've been doing this—erecting and maintaining crosses on public land—for a long time now, and cross monuments and memorials are ubiquitous in and around this country.").

A cross "is not merely a reaffirmation of Christian beliefs" but also "a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Buono*, 559 U.S. at 721 (plurality); accord *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) ("The erection of such a cross [can be] a political act, not a Christian one."). Thus,

"[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs." *Buono*, 559 U.S. at 718–19 (plurality). That crosses are not the *exclusive* symbol "used to honor and respect" the fallen, see *id.* at 721, does not diminish the fact that crosses can transcend religious affiliation. See, *e.g.*, Br. of Md.-Nat'l Capital Park & Planning Comm'n at 6 (explaining how several families of Jewish World War I veterans requested crosses as grave markers in lieu of Stars of David to avoid drawing any distinction between their loved ones and their comrades).

Crosses, like the Peace Cross at issue in this case, have a long and rich history—traceable to the Founding—of honoring and memorializing the dead. And crosses continue to be used across the Nation to honor and remember lives cut short by sudden, horrific events.

One of the most powerful examples is the 9/11 cross. After the terrorist attacks of September 11, 2001, a rescue worker found a fused column and steel cross-beam in the rubble of the World Trade Center. Left standing after the Twin Towers fell, the steel beams formed a nearly 20-foot Latin cross—a symbol of hope for rescue workers and the country as a whole. *Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 234, 236–37 (2d Cir. 2014). The Cross at Ground Zero "came to represent 'the human spirit,' and 'good over evil,' for numerous people, no matter 'what religion you were, what faith you believed in.'" *Id.* at 240. In the shadow of devastating events, the Cross at Ground Zero served as "an inclusive symbol for any persons seeking hope and comfort," around

which the country could come together in grief and consolation. *Id.* at 244.

[3]

Another example is a display created last year after a mass shooting in Las Vegas claimed the lives of 58 concertgoers and injured hundreds more. An artist placed 58 white wooden crosses—one for each life lost—beside the famous "Welcome to Las Vegas" sign on the outskirts of the city. In the weeks that followed, tourists visiting the city gathered around the spontaneous memorial to mourn the slain and pay tribute to the victims. Jay Jones, *Tourists Coming to Las Vegas Add Stops at Memorials to Victims of Deadly Shooting to Their Itineraries*, L.A. Times (Oct. 9, 2017), http://goo.gl/pW869Z.[4]

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[3] Rich Calder, *Steel "Cross" Will Stay at WTC Memorial: Court*, N.Y. Post (July 28, 2014), http://goo.gl/Lx97Jq.

[4] The same artist created a display featuring Stars of David on the public sidewalk outside the Tree of Life synagogue in Pittsburgh, Pennsylvania after the horrific shooting that occurred there. Mike Shoro, *Carpenter Follows Las Vegas Crosses with Stars of David in Pittsburgh*, Las Vegas Rev. J. (Oct. 29, 2018), http://goo.gl/K3cPjv. This memorial powerfully attests that the cross is certainly not the only symbol used to memorialize the

Memorial crosses offer consolation not only when cataclysmic events like 9/11 or the Las Vegas shooting grip the Nation, but also when daily tragedies strike the lives of its people—as with the makeshift memorials along public highways, where roadside crosses mark the ground where loved ones have been killed by drunk drivers.

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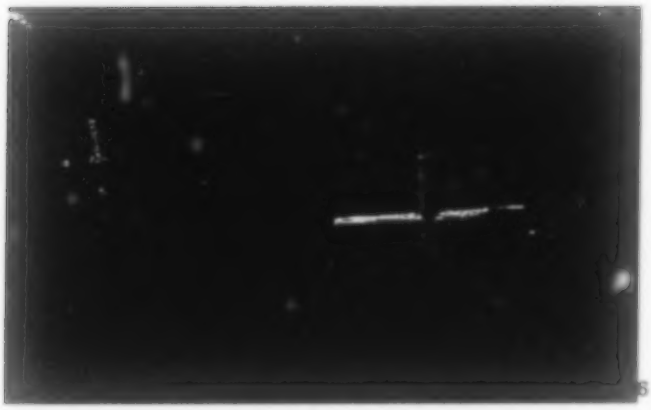
fallen. But if the decision below is permitted to stand, no religious symbol could be used in such a manner.

[5] *Greek-American Greg Zanis Installs 58 Crosses to Honor Las Vegas Victims*, Nat'l Herald (Oct. 7, 2017), http://goo.gl/qSkaSX.



This year's devastating California wildfires, which took the lives of several firefighters, gave rise to similar memorials placed by local residents.

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[6] Shawn Clubb, *Sobering Signs: Roadside Memorials Plan Seeks to Increase Awareness of Drunken Driving*, St. Louis Post-Dispatch (May 20, 2008), http://goo.gl/7aaax4.

[7] Sarah Mervosh, *Mendocino Complex Fire in California Is Now Largest in Modern State History*, Inlander (Aug. 7, 2018) (crediting article to N.Y. Times), http://goo.gl/FrbGPe.

The use of the cross as a centerpiece of civic remembrance thus marks the preciousness—and fragility—of human life, *Buono*, 559 U.S. at 718–19 (plurality), and participates in the longstanding tradition and history of honoring the fallen. Indeed, while the cross is often found at sites of sorrow, its civic meaning runs even deeper.

Amicus has long held the view that the cross "effectively convey[s] the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety. * * * [A] cross is widely recognized as a memorial for a person's death *and especially* respect to those who have given their lives to insure the safety and protection of others." *Davenport*, 637 F.3d at 1111 (emphasis added).

In many cases, the cross not only stands for the tragedy of unforeseen death, but also memorializes heroism *in the face of* impending disaster—a willingness to exemplify the best ideals of humanity, to serve and support one's neighbor, under the worst of circumstances. First responders, in particular, have embraced the cross not as a symbol of religion but as an icon of courage, selflessness, and devotion.

For example, one of the oldest firefighters' symbols is the Maltese cross, which traces its origin to the medieval Knights of Malta. Tom Kiurski, *A Piece of Fire Service History: The Maltese Cross*, Fire Eng'g (Feb. 9, 2007), http://goo.gl/UF8BJP. During a brutal battle, the story goes, the Knights found themselves confronting enemies who used naphtha—flammable oil—as a weapon of war. *Ibid.* But they did not retreat: Instead, the Knights bravely risked their lives to extinguish the flames that covered their brethren.

Ibid. They tore off their flowing capes and used them to smother the blazes—forever linking the Maltese cross ensign with the self-sacrificial work of firefighting. Michael L. Kuk, *Symbols of Service, in International Association of Fire Chiefs: Commemorative History* 82 (Ann Swing Kelly & Mary Burke Marshall eds., 2000).

Another traditional firefighters' symbol is the Florian cross, which dates back to ancient Rome. According to legend, Florian and his fellow soldiers were tasked with fighting fires within the city. Though not the first to perform this duty, they were viewed as the best. Camila Martinez-Granata, *The Maltese vs. Florian Cross: Which One Is Correct?*, FireRescue1 (Mar. 10, 2017), http://goo.gl/Mu5sgA. Over time, Florian became linked with a distinctive cross symbol, which many firefighting departments have adopted as their own. *Ibid.*

Today, Maltese and Florian crosses figure prominently in memorials commemorating firefighters who have lost their lives in the line of service. A Florian cross, for example, rests at the heart of the National Fallen Firefighters Memorial in Emmitsburg, Maryland.

A similar cross forms the centerpiece of the South Dakota Firefighters Memorial in Pierre, South Dakota. *Fallen Fire Fighters Memorial*, S.D. Firefighters Ass'n, http://goo.gl/c3CLEh. And the public Wisconsin State Firefighters Memorial in Wisconsin Rapids, Wisconsin displays a Florian cross above the words "All Gave Some. Some Gave All." *Welcome*, Wisc. St. Firefighters Memorial, http://goo.gl/wp3vjF.

In addition to Maltese and Florian crosses, Latin crosses have also been used to honor and commemorate firefighters who have made the ultimate sacrifice in the line of duty. In 1949, thirteen smokejumpers—firefighters who parachute into the middle of forest fires—perished in the Mann Gulch fire in the Helena National Forest in Montana. To memorialize their

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[8] *National Fallen Firefighters Memorial Park*, Tourism Council of Frederick Cty., http://goo.gl/QXG2xz; *National Fallen Firefighters Memorial*, Nat'l Fallen Firefighters Found., http://goo.gl/j7Wa3s.

sacrifice, thirteen white, concrete crosses were placed on the steep slope of the Gulch where the men lost their lives. *Missoula Smokejumpers Place Granite Columns Where Firefighters Fell*, Great Falls Trib. (May 21, 1997), http://goo.gl/HNr9UZ.

[9]

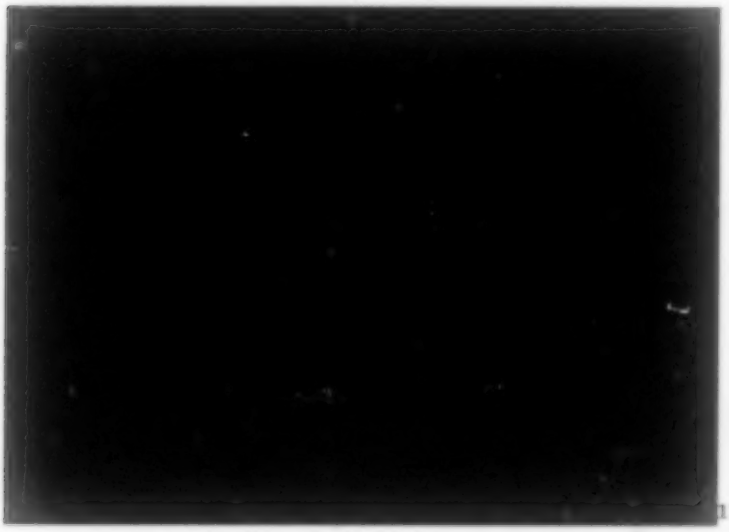
[9] Tom Kotynski, *A Mann Gulch Remembrance Tour*, Out There With Tom (June 14, 2012), http://goo.gl/tMAhb8.

Similarly, fourteen granite crosses stand on Storm King Mountain in Colorado to honor firefighters who lost their lives fighting the South Canyon Fire in 1994.

[10]

[10] Andrew Gulliford, *In the Line of Fire*, The J. (July 21, 2012), http://goo.gl/D64yYz.

And crosses clustered across Granite Mountain in Arizona honor the "Hotshots" wildlands firefighting crew—nineteen of whom lost their lives in 2013 while battling the Yarnell Hill Fire, and whose valor was recently depicted in the film *Only the Brave*.

 [11]

For firefighters, these cross memorials are doubly meaningful. They signify the sadness and sense of loss that accompanies unexpected death—just as the makeshift memorials along America's highways do. But they also evoke symbols firmly grounded in firefighting tradition and culture. The meaning of these crosses is multilayered—but never exclusively sectarian.

So too with the internationally recognized symbol for emergency medicine—a white cross on a green

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[11] Bayan Wang, *Prescott, Still Healing, Honors 19 Fallen Granite Mountain Hotshots Five Years Later*, Ariz. Republic (June 30, 2018), http://goo.gl/FupD4C.

background (or, in some cases, the reverse). *First Aid*, Organisation Internationale de Normalisation (May 1, 2011), http://goo.gl/EfGujW. Like the Maltese and Florian crosses, its historical roots run deep: The design was first used by the Hospitallers of St. Lazarus, an order of medieval knights known for serving the vulnerable by building hospitals, hospices, and other medical facilities. *Welcome*, Saint Lazare Int'l (2018), http://www.saint-lazare.org/. The Hospitallers' cross appears prominently on public memorials—those, for example, dedicated to fallen aid workers.

[12]

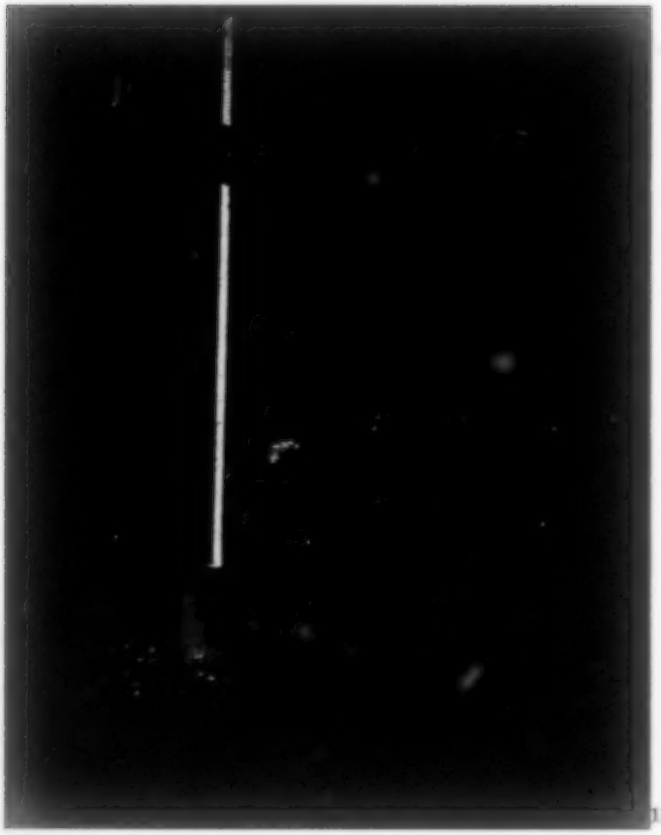
The Hospitallers' cross has become a global symbol through decades of widespread use. Indeed, the International Organization for Standardization has recognized the universality of this design by declaring it an international standard, which all nations should adopt. It symbolizes those who risk—and sometimes

[12] *Spring Lake Memorial*, Wikimedia Commons (Aug. 22, 2010), http://goo.gl/W7Aay3.

lose—their lives in the service of others through emergency medicine. Its message of remembrance, and its promise of hope, is universal.

Among police officers, the cross is used as a symbol of especially heroic service. The New York Police Department bestows the Combat Cross medal—its second-highest award—on officers who "successfully and intelligently perform an act of extraordinary heroism while engaged in personal combat with an armed adversary under circumstances of imminent personal hazard to life." *New York City Police Department Combat Cross*, NYC.gov, http://goo.gl/46eoHi. San Diego's Police Cross is "[a]warded posthumously to an officer who in the performance of their duty and under honorable circumstances lost their life by a hostile person or during an act of bravery." *SDPD Formal Awards*, San Diego Police Museum, http://goo.gl/NMmf92. And the Illinois Association of Chiefs of Police awards its Police Cross decoration to the families of officers who "lost [their lives] in the performance of duty under honorable circumstances." *Police & Citizen Awards*, Ill. Ass'n of Chiefs of Police, http://goo.gl/muQdHV.

The self-sacrifice captured by the symbol of the cross is reflected in police departments' other rites of remembrance. *Amicus*, for instance, built and placed 12-foot memorial crosses along Utah's highways to honor fallen state officers. The crosses' designers "were inspired to use the Latin cross for the fallen trooper memorials because of the presence of such crosses in military cemeteries, which honor fallen service members for their sacrifice, and roadside memorials found where traffic fatalities have occurred." *Davenport*, 637 F.3d at 1118.

 [13]

[13] Kimberly Scott, *Dats Trucking Sets 15th Memorial Cross for UHP Trooper on Property Where Atheist Ban Doesn't Apply*, St. George News (Dec. 30, 2016), http://goo.gl/fZojmx.

Last year, Cincinnati police officers marked Police Memorial Day by displaying a field of crosses emblazoned with the names of fallen officers.

[14]

For first responders around the Nation, the cross represents the highest ideal of selfless courage—never religious exclusivity.

II. Crosses That Memorialize The Fallen Are Not Constitutionally Suspect.

As members of this Court have long observed, Establishment Clause jurisprudence is in "hopeless disarray." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J. concurring). If there is any common strand amid the tangle of doctrines, tests, and approaches, it is a focus on our Nation's history and traditions. See, *e.g.*, *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in

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[14] Tana Weingartner, *Mayor Apologizes As Officers Mark Police Memorial Day*, WVXU (May 19, 2017), http://goo.gl/P4BQm3.

part) (explaining that "the meaning of the Clause is to be determined by reference to historical practices and understandings"). "Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Ibid.*

For instance, in *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014), what mattered was not how long the town council had been opening its meetings with a prayer—indeed, that particular practice had only a fifteen-year history. Nor did the Court consider whether the practice at issue—prayer by volunteer clergy on a rotating basis before a local government body—had a precise analog at the Founding. Instead, the question was simply whether the town's practice was consistent with our Nation's history and tradition of legislative prayer. *Id.* at 577 ("The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures."); see also *id.* at 591–92 ("The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.").

In sum, while "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings," *Allegheny*, 492 U.S. at 670, "the relevance of history is not confined to the inquiry into whether the challenged practice itself is part of our accepted traditions dating back to the Founding"—instead, the Establishment Clause permits "not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion," *id.* at 669. See also

Town of Greece, 572 U.S. at 587 (referencing the Pledge of Allegiance as a constitutional practice even though it did not exist at the time of the Founding). A memorial cross honoring the service and sacrifice of fallen patrol officers placed two years ago fits as comfortably within our Nation's history and tradition as one honoring the service and sacrifice of veterans placed two hundred years ago.

The case of the Peace Cross—a memorial placed nearly a century ago to honor those who made the ultimate sacrifice for their country in World War I—is an easy one. Not only is the memorial deeply engrained in the Nation's long history of using crosses as symbols of remembrance and sacrifice, but it has also stood unchallenged for nearly a century. See *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005). The Peace Cross thus easily passes muster under any of the Establishment Clause tests this Court has applied. Br. of Md.-Nat'l Capital Park & Planning Comm'n at 23–59; see also *Buono*, 559 U.S. at 715–16, 721 (plurality) ("Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message.").

The same thing is true of memorial crosses placed more recently to remember the sacrifice and honor the loss of first responders, victims of mass shootings, and those lost to the scourge of drunk driving. These memorials too fit comfortably within our Nation's long custom, tradition, and history of placing crosses on public highways and byways not only to honor the sacrifice of patriots who died in the line of duty, but also to commemorate and remember loved ones who died

too soon and in tragic circumstances. Indeed, the Nation's practice of placing roadside memorials dates back over two hundred years. Charles O. Collins & Charles D. Rhine, *Roadside Memorials*, 47 Omega 221, 223–24 (2003). First responder memorials—like those placed by *amicus* to honor fallen state troopers, or those clustered on Storm King and Granite Mountains to pay homage to fallen firefighters—lie at the intersection of both traditions.

These memorials are often placed on or near the scene to remind the public of a fallen responder's selfless sacrifice in the line of duty—not to endorse a creed. See *Allegheny*, 492 U.S. at 662 ("[W]here the government's act of recognition or accommodation is passive and symbolic, * * * any intangible benefit to religion is unlikely to present a realistic risk of establishment."). They pose no greater danger of establishing religion than the Ten Commandments in *Van Orden*, the Mojave Desert cross in *Buono*, or the Peace Cross in this case. See *id.* at 662–63 ("[W]here the government's act of recognition or accommodation is passive and symbolic, * * * any intangible benefit to religion is unlikely to present a realistic risk of establishment."). They present no greater risk of excessive entanglement or endorsement. And they threaten no greater menace of coercion. See *id.* at 670 ("Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.").

These memorials are erected, funded, and maintained with the intent to honor and remember those who tragically lost their lives. Crosses are "certainly a Christian symbol," but when placed not "to promote

a Christian message" but to honor and remember the fallen, there is no risk of "set[ting] the *imprimatur* of the state on a particular creed." *Buono*, 559 U.S. at 715 (plurality).

If anything, the risk is that forcibly removing these memorials—as *amicus* was required to do—would inspire only a "hostil[ity] [to] matters of religion * * * bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Buono*, 559 U.S. at 726 (Alito, J., concurring in part and concurring in the judgment). The Establishment Clause does not require such drastic measures, which understandably may be seen "as a sign of disrespect for the [fallen] whom the cross[es] [were] meant to honor." *Ibid.*

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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